2014 WL 5734051 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,
v.
Danny KUEHNER, Defendant-Appellant.

No. 4-12-0901.
January 8, 2014.

Appeal from the Circuit Court of the Seventh Judicial Circuit Sangamon County, Illinois No. 05-CF-724
Honorable Patrick W. Kelley Judge Presiding.

Brief and Argument for Plaintiff-Appellee

John C. Milhiser, Sangamon County State's Attorney, Sangamon County Complex, Springfield, Illinois 62701, Patrick Delfino, Director, David J. Robinson, Deputy Director, Kathy Shepard, Staff Attorney, State's Attorneys Appellate, Prosecutor, 725 South Second Street, Springfield, Illinois 62704, (217) 782 - 8076, 4thdistrict@ilsaap.org, for plaintiff-appellee.

***i** POINTS AND AUTHORITIES

I

***ii** II

***1** NATURE OF THE CASE

Defendant was charged with attempted murder (Counts I and VII), home invasion (Counts II and VIII), residential burglary (Counts III and IX), robbery of a senior citizen (Count IV and X), aggravated battery to a senior citizen (Counts V and XI), and criminal damage to property (Count VI). He pleaded guilty to Count VII, attempted murder, and Count VIII, home invasion, in exchange for dismissal of the remaining counts and an armed robbery charge in a separate case. The trial court entered judgment on his plea and dismissed all but counts VII and VIII. The court later sentenced him to consecutive 171/2-year prison terms on each count and denied his motions to vacate his guilty plea and reduce sentence.

This court affirmed on direct appeal. Defendant filed a pro se post-conviction petition which the trial court advanced to second-stage proceedings. The State filed a motion to dismiss and appointed counsel filed a motion to withdraw. Defendant now appeals dismissal of his petition, asserting error only in the grant of the motion to withdraw.

***2 ARGUMENT**

I THE TRIAL COURT WAS CORRECT IN GRANTING POST-CONVICTION COUNSEL'S MOTION TO WITHDRAW AS COUNSEL.

Relying on People v. Greer, 212 I11.2d 192, 817 N.E.2d 511 (2004), and People v. Komes, 2011 IL App (2d) 100014 (2d Dist. 2011), defendant contends the trial court erred in granting post-conviction counsel's motion to withdraw, where, he asserts, (a) the motion was insufficient in that it failed to explain why all of defendant's claims are frivolous, (b) the record consequently does not show counsel fulfilled her Rule 651(c) duty to consult with him to ascertain his claims, and (c) the record does not show that one of the two allegedly unaddressed claims is frivolous and patently without merit.

The motion to withdraw did address one of those two allegedly unaddressed claims. The petition does not contain the other. Defendant does not assert the claims the petition does raise were not frivolous, or that counsel or the trial court erred in concluding they were. His arguments regarding Rule 651(c) explicitly and implicitly concede counsel complied with the rule. He thereby concedes that, as the record shows, the trial court correctly allowed counsel to withdraw.

A. Standards. Rule 651(c) requires that the record in ***3** post-conviction proceedings show that appointed counsel:

> [1] has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, [2] has examined the record of the proceedings at the trial, and [3] has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions.

S. Ct Rule 651(c)

"Post-conviction counsel is only required to investigate and properly present the petitioner's claims." People v. Pendleton, 223 I11.2d 458, 472, 861 N.E.2d 999, 1007 (2006) (quoting People v. Davis, 156 I11.2d 149, 164, 619 N.E.2d 750 (1993) (emphasis in Davis). Appointed counsel has no duty to "explor[e], investigat[e]," or "formulat[e]" "potential claims." Davis, 156 I11.2d at 163, 619 N.E.2d at 758.

The supreme court in Greer stated it had "repeatedly held" post-conviction counsel must perform the specific duties set forth in Rule 651(c), but held fulfillment of the third Rule 651(c) duty "does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf." It ruled "[a]n attorney, such as the one in this case, who determines that defendant's claims are meritless cannot in good faith file an amended petition on behalf of defendant." Greer, 212 I11.2d at 204-205, 817 N.E.2d at 519-520.

The court ruled appointed post-conviction counsel is not required to continue representation of a defendant after ***4** determining defendant's petition is frivolous and patently without merit, "and the attorney is clearly prohibited from doing so by his or her ethical obligations." Greer, 212 I11.2d at 209, 817 N.E.2d at 522. It then stated "Counsel, in this case, determined that defendant's claims were meritless. We agree with that assessment. Defendant does not argue to the contrary. The record clearly refutes defendant's claims." Greer, 212 I11.2d at 210, 817 N.E.2d at 522. The court then explained how the record refuted the petition's claims (Greer, 212 I11.2d at 210-211, 817 N.E.2d at 522-523), and concluded:

The record itself demonstrates that defendant's postconviction allegations were patently without merit and frivolous. Under the circumstances, the Act presents no impediment to withdrawal of counsel. Although we hasten to emphasize that the inability of postconviction counsel to "properly substantiate" a defendant's claims is not the standard by which counsel should judge the viability of a defendant's postconviction claims, and that an attorney moving to withdraw should make some effort to explain why defendant's claims are frivolous or patently without merit, it nonetheless appears that counsel fulfilled his duties as prescribed by Rule 651(c), and the record before us supports counsel's assessment that the defendant's postconviction claims were frivolous and without merit. Consequently, though the procedure in the circuit court leaves something to be desired, defense counsel should be allowed to withdraw, and we affirm the judgment of the appellate court in that respect.

Greer, 212 Ill.2d at 211-212, 817 N.E.2d at 523 (emphasis added).

Quoting that paragraph, the court in Komes stated "[t]he ***5** Greer court *** held that a reviewing court can uphold the grant of such a motion despite its deficiency if the record shows that counsel complied with the requirements of Rule 651(c) and that all the claims are frivolous." Komes ¶29. In Komes, as here, the trial court appointed counsel on finding the defendant's pro se petition was not subject to first-stage dismissal, then granted appointed counsel's motion to withdraw and the State's motion to dismiss. Id. ¶1. Focusing on the Greer sentence fragment "an attorney moving to withdraw should make some effort to explain why defendant's claims are frivolous or patently without merit, it discussed at length what constitutes a sufficient motion to withdraw, then found the motion before it was plainly less than what the Greer court described as sufficient, not in the form prescribed by Greer, and not nearly as detailed as the motion in Greer." Id. ¶¶29-31. It stated "[b]ecause the motion was not in the prescribed form, we next must ask whether counsel complied with the requirements of Rule 651(c) and whether it can be determined from the record and counsel's representations that each of defendant's claims was frivolous." Id. ¶32. Finding the record failed to show compliance with Rule 651(c) where the motion to withdraw contained an unreliable discussion of such compliance, it vacated the grant of the motions to withdraw and to dismiss. Id. ¶¶35-37.

***6** B. Defendant contends (a) citing Komes, that the motion to withdraw was insufficient where it failed to address what he asserts are two of the petition's claims, namely, that (1) defense counsel "Sharp lied to him, his mother, and his aunt about the evidence that the State had against him"; and (2) "he was prejudiced by Sharp's failure to investigate his mental health problems, at least partly because he was not made aware that such evidence could have been used to mitigate his sentence" (deft. brf at 19-20), (b) counsel's failure to address those two alleged claims shows she failed to fulfill her Rule 651(c) duty to "consult[] with petitioner *** to ascertain his or her contentions of deprivation of constitutional rights" (S.Ct. Rule 651(c)), and (c) the record fails to show that all his claims are frivolous and patently without merit, where (i) the trial court's first-stage finding that the petition was not frivolous and patently without merit should have controlled and required denial of the motion to withdraw, and alternatively, (ii) allegedly unaddressed claim (1) is supported by affidavits attached to the petition. Defendant also contends (d) "Where a defendant's post-conviction petition has been dismissed prior to an evidentiary hearing, review is de novo. People v. Waldrop, 353 Ill.App.3d 244, 248 (2d Dist. 2004)." Deft. brf at 18.

C. Background. Defendant pleaded guilty to attempted ***7** murder and home invasion. According to the factual basis for the plea, 98-year-old Margaret Geldrich was found unconscious in a pool of blood in her kitchen. Her extensive injuries included fractures to her arm and face, dislocation of her shoulder, and substantial bleeding from her head and face. After she eventually regained consciousness, she stated there were two people inside her home. (R. Vol. V, 17-18, 21-22, Vol. IX, 43-44, 62, Exs. env. 1, People's Exs. 3-7)

The trial court entered judgment on defendant's plea, and, after an evidentiary hearing, denied defendant's motion to vacate it. (R. Vol. V, 22, Vol. IX, 40-41)

Codefendant Bruce Lloyd pleaded guilty and codefendant Chris Howell was adjudicated delinquent for their participation in the offenses. (R. Vol. III, C410-C411, Vol. IX, 95) Defendant testified at the juvenile proceeding against Howell. (R. Vol. IX, 18, Exs. env. 1, People's Ex. 1) The trio chose the victim's home because she was **elderly**, had very limited vision and hearing,

and was particularly **vulnerable**. (R. Vol. V, 19) At defendant's sentencing, the trial court found Lloyd was more involved than defendant, stated it had heard no competent evidence defendant personally injured the victim, and imposed consecutive 171/2-year prison terms. (R. Vol. IX, 100-103) Defendant filed a motion to reconsider sentence and/or withdraw guilty plea, which the court denied. ***8** (R. Vol. I, C145-C146, Vol. V, 56)

On direct appeal, defendant argued his sentence was an abuse of discretion. This court disagreed and affirmed. People v. Kuehner, No. 4-07-0426 (unpublished May 7, 2008, order) (R. Vol. I, C171-C177)

Defendant filed a pro se post-conviction petition alleging two "counts," each titled "Ineffective Assistance of Counsel/Due Process," asserting failings of defense counsel Sharp (Count I) and counsel on direct appeal (Count II).

The petition's "Count I. Ineffective Assistance of Counsel/Due Process" alleged as follows. Defendant's rights to effective assistance and due process were violated "when his counsel John Sharp failed to investigate [defendant's] mental issues, told [defendant], his mother Julie Meyer and his aunt Pam Meyer lies in order to force a guilty plea upon [defendant]." (R. Vol. I, C189) Sharp admitted he failed to subpoena defendant's medical records after he was made aware defendant was released from a psychiatric ward the day he was arrested. Defendant's actions and medical records "would confirm [defendant's] medical problems and would raise a 'bona fide doubt' regarding his competence," but "counsel failed to make a professional, lawyer-like effort to ascertain whether [defendant] had any mental illness after counsel had been so advised." Defendant's case was "almost identical to" ***9** Brown v. Sternes, 304 F.3d 677 (7th Cir. 2002). (R. Vol. I, C189-C191)

The petition's "Count I" further alleged that counsel Sharp told defendant's aunt "that she did not 'pay him enough money' to take [defendant's] case to a jury trial," so asked his aunt and mother to convince him "that it was in his best interest to plead guilty" to attempted murder and home invasion "and that if he did he would receive between 12 and 20 years." (R. Vol. I, C191) It alleged Sharp was ineffective and his "failure to act diligently prejudiced" defendant "because it precluded him from: (1) receiving a proper competency hearing; (2) raising an insanity defense; (3) arguing he should receive a more lenient sentence in light of his mental illness; and (4) "most importantly, precluded him from pleading not guilty." (R. Vol. I, C191)

The petition's "Count II. Ineffective Assistance of Counsel/Due Process" alleged as follows. Defendant's rights to effective assistance and due process were violated when counsel on direct appeal failed to argue on appeal issues of which counsel "clearly had knowledge." (R. Vol. I, C192) Defendant informed appellate counsel "that he wanted to withdraw his guilty plea" on grounds that:

(1) counsel Sharp was ineffective in failing to investigate defendant's mental issues, hiding police reports and medical records in order to coerce him into a guilty plea, ***10** telling him he would receive 12-20 years if he pleaded guilty, and manipulating his aunt and mother into believing they had to convince him to plead guilty because his aunt did not pay Sharp enough to take the case to trial; and

(2) defendant had a defense worthy of consideration. Defendant pleaded guilty "without any knowledge of what was in medical records or police reports." After defendant fired Sharp and his aunt hired Sean Liles, Liles showed defendant medical records, police reports and other evidence which "he never even knew existed" and which showed no doctor or nurse stated the victim was in a "life-threatening situation." They showed doctors and nurses stated the victim was beaten but was in "stable" condition "and no one charged in this case ever implicated that there was an 'intent to kill' which would implicate that this Attempted First Degree Murder charge has no merit." [Sic] Co-defendant Howell was charged with the same crimes under the accountability theory but was acquitted of attempted murder and found guilty of aggravated battery. "If [defendant] had the opportunity to submit his case to a trial even if he were found guilty it obviously would not be for an Attempted First degree Murder." (R. Vol. I, C192-C193)

In her affidavit, Pam Meyer stated in part as follows. She was defendant's aunt. "Mr. Sharp told us about some evidence they had against [defendant], including [defendant's] ***11** t-shirt with blood on it, saying it was probably the victim['s. It ended

up being someone else's blood and had nothing to do with the case." (R. Vol. II, C202) Shortly after she hired Sean Liles, he showed "us" medical records and police reports "we never knew existed," some of which "indicated that the victim was in 'stable condition' and had no 'life threatening injuries," indicating "this was not an Attempted First Degree Murder." Co-defendant Howell was charged with the same crimes under an accountability theory but was found not guilty of attempted murder and guilty of aggravated battery. (R. Vol. II, C203)

In her affidavit, Julie Meyer stated in part as follows. She was defendant's mother. Sharp told her if she did not convince defendant to plead guilty he would be in prison for the rest of his life, but if she convinced him to plead guilty he would receive 12-20 years. (R. Vol. II, C205) She stated:

> I was very scared when John Sharp told me there was evidence that would get [defendant] put in prison for life. I found out later that more evidence existed and John Sharp told me lies but at that time I was scared for my son's life so I thought I had to get him to plead guilty. [Defendant] was not aware of the evidence. He only knew what my sister Pam Meyer and I told him. *** [Defendant] did not plead guilty because he is guilty, he plead guilty because his lawyer told me to give him information that I later found out was false, he was mentally ill, his attorney, his aunt and I all told him he had to plead guilty.

(R. Vol. I, C205-C206)

***12** The trial court found the petition was not frivolous or patently without merit, and appointed counsel. (R. Vol. III, C382) The State filed a motion to dismiss. (R. Vol. III, C387-C388) Post-conviction counsel filed a motion for leave to withdraw and brief in support. (R. Vol. III, C405-C415)

In her motion to withdraw, post-conviction counsel stated that after conducting "a careful review" of "the entire record" and controlling law and "a thorough review of the issues raised by [defendant]," counsel "concluded that the issues raised by the [defendant] are without merit and unsupportable as a matter of law." (R. Vol. III, C414)

In her brief in support, post-conviction counsel stated defendant argued counsel Sharp was ineffective in failing to have him evaluated for fitness despite Sharp's knowledge of defendant's hospitalization for depression immediately prior to commission of the charged offenses. (R. Vol. III, C408) As to that claim, counsel stated (a) at Howell's trial, defendant testified he understood the nature of the proceedings against him and that he had not been promised any specific sentence in exchange for his testimony, but was hopeful the State would show him leniency at sentencing in light of his cooperation, (b) at the hearing on defendant's motion to withdraw plea (i) evidence was presented of his mental status on the date of the crime, (ii) defendant testified he understood the nature of ***13** the proceedings against him, and (iii) Sharp testified defendant "always appeared to understand the law as Attorney Sharp explained it and that he was able to aid in his own defense," and that "he never had any doubt that [defendant] understood the nature and gravity of the proceedings against him," (c) in denying the motion to withdraw plea, the trial court found there was insufficient evidence to raise a bona fide doubt of defendant's ability to understand the proceedings against him, (d) that defendant was able to aid in his own defense also was shown "by his quick cooperation and many admissions that he was hopeful that by cooperating quickly he would avoid a harsher punishment," and (e) Brown was "factually very different." (R. Vol. III, C408-C410)

Counsel stated defendant also did not "appear to have any valid insanity defense based on the proximity of his hospital stay to the crime committed" where he testified at the motion to vacate plea that "at the time the crime was committed he understood that the things he was doing were wrong and that he was able to change his behavior to conform to the law but that he chose not [to] alter his behavior." (R. Vol. III, C410)

Counsel further stated defendant had asked her to investigate a possible disparity in his and Howell's sentences. Counsel explained the ways in which defendant and Howell were not similarly situated. (R. Vol. III, C410-C411)

***14** Counsel concluded that after "a thorough review" of the "case file and the relevant law," counsel "could find no flaws in the procesdefendant received or errors by any of his counsel constituting ineffectiveness. (R. Vol. III, C411)

Defendant, pro se, filed a "Motion to Strike" counsel's motion for leave to withdraw and a brief in support with exhibits. (R. Vol. III, C417-C442) At the hearing on the motion to withdraw the trial court heard arguments from defendant and post-conviction counsel, then granted the motion to withdraw and the State's motion to dismiss. (R. Vol. III, C453-C454, Vol. X, 9)

D. Analysis. As shown above, in determining whether counsel should be allowed to withdraw, the inquiry under Greer is whether the record indicates "counsel fulfilled his duties as prescribed by Rule 651(c)" and "supports counsel's assessment that the defendant's postconviction claims were frivolous and without merit." Greer, 212 I11.2d at 212, 817 N.E.2d at 523; see People v. Greer, 341 Ill.App.3d 906, 910, 793 N.E.2d 217, 221 (4th Dist. 2003) (same). The supreme court in Greer did not examine, rule on, or base its ruling on, the sufficiency of the motion to withdraw. Instead, it simply stated "an attorney moving to withdraw should make some effort to explain why defendant's claims are frivolous or patently without merit." Greer, 212 I11.2d at 212, 817 N.E.2d at 523.

***15** Defendant's argument (a) regarding the sufficiency of the motion to withdraw (deft. brf at 18-20) thus is misplaced. That argument and Komes, on which it is based, misread Greer to the extent Komes states and defendant's argument asserts that on review of a trial court's grant of a motion to withdraw as post-conviction counsel: (1) the first step is determining the motion's sufficiency; and (2) a determination that the record shows "counsel fulfilled his duties as prescribed by Rule 651(c)," and "supports counsel's assessment that the defendant's postconviction claims were frivolous and without merit" (Greer, 212 I11.2d at 211-212, 817 N.E.2d at 523) is but an "alternative" basis for affirmance "despite an insufficient motion." Cf. deft. brf at 18-20; Komes ¶27-29. The State notes that (3) Komes also erroneously describes the standard for affirming the grant of a motion to withdraw as the standard for affirming the petition's dismissal:

> [C]ounsel sought leave to withdraw, citing People v. Greer, 212 I11.2d 192, 288 Ill.Dec. 153, 817 N.E.2d 511 (2004). The court granted counsel's motion and then dismissed the petition on the State's motion; defendant appealed. Defendant now argues that the motion was insufficient under Greer. He further argues that we cannot affirm under Greer's alternative standards for affirming such a dismissal. Greer allows a reviewing court to affirm despite an insufficient motion when, for one, the record shows that counsel complied with Illinois Supreme Court Rule 651(c) (eff. Dec.1, 1984).

Komes ¶1 (emphasis added).

***16** That post-conviction counsel has been granted leave to withdraw does not mean the petition is dismissed. Greer, 341 Ill.App.3d at 910, 793 N.E.2d at 221. Contrary to the court in Komes, the supreme court in Greer (a) did not state the standard for affirming a petition's dismissal, but rather (b) declined to address issues not raised by defendant Greer, who argued only that the trial court erred in granting post-conviction counsel's motion to withdraw, and (c) affirmed this court's remand to the trial court, (d) which this court had ordered on grounds the petition was erroneously dismissed sua sponte after 90 days had passed and no motion to dismiss had been filed (Greer, 212 I11.2d at 195-196, 212, 817 N.E.2d at 514, 523; Greer, 341 I1*l*.App.3d at 910, 793 N.E.2d at 221).

As shown above, moreover, counsel's motion to withdraw and brief in support do address all the petition's claims. (R. Vol. I, C188-C194, Vol. Ill, C405-C415) They more than adequately comply with the statement in Greer "that an attorney moving to withdraw should make some effort to explain why defendant's claims are frivolous or patently without merit." See Greer, 212 I11.2d at 212, 817 N.E.2d at 523.

As to defendant's argument (d), the Waldrop court stated "[w]e review de novo the dismissal of a postconviction petition without an evidentiary hearing." Waldrop, 353 Ill.App.3d at 248, 818 N.E.2d 888, 892-893, citing ***17** People v. Williams, 186 I11.2d

55, 59-60, 708 N.E.2d 1152 (1999). The Williams court stated "[t]his court reviews the dismissal of a post-conviction petition without an evidentiary hearing de novo." Williams, 186 I11.2d at 59-60, 708 N.E.2d at 1154.

Waldrop and Williams state the standard of review for dismissal of a post-conviction petition without an evidentiary hearing, not for a ruling on post-conviction counsel's motion to withdraw as counsel. Id.; Waldrop, 353 Ill.App.3d at 248, 818 N.E.2d at 892-893; see Greer, 341 I11.App.3d at 910, 793 N.E.2d at 221 (grant of leave to withdraw does not mean petition is dismissed). There was no motion to withdraw as post-conviction counsel, either in the trial court or on appeal, in either Waldrop or Williams. The courts in both cases stated the standard of review in stating the issue on appeal, which was whether dismissal of a post-conviction petition without an evidentiary hearing should be reversed on the ground post-conviction counsel failed to comply with Rule 651(c). Waldrop, 353 I11.App.3d at 248-250, 818 N.E.2d at 892-894; Williams, 186 11.2d at 59, 708 N.E.2d at 1154.

Neither Waldrop nor Williams states the standard of review for a trial court's ruling on post-conviction counsel's motion to withdraw as counsel. Cf. id. As discussed above, the supreme court in Greer stated the standard for upholding the grant of such a motion: where the record indicates "counsel ***18** fulfilled his duties as prescribed by Rule 651(c)" and "supports counsel's assessment that the defendant's postconviction claims were frivolous and without merit." Greer, 212 I11.2d at 212, 817 N.E.2d at 523. The supreme court in Greer applied that standard in determining whether to uphold the order granting the motion to withdraw, and indicated it was the same as the one by which the motion is to be judged in the trial court. See id. The supreme court's decision in Greer thus indicates that review of a grant of post-conviction counsel's motion to withdraw is de novo. Id.

Defendant maintains his petition raised but counsel failed to address in the motion to withdraw claims that: (1) defense counsel "Sharp lied to him, his mother, and his aunt about the evidence that the State had against him"; and (2) "he was prejudiced by Sharp's failure to investigate his mental health problems, at least partly because he was not made aware that such evidence could have been used to mitigate his sentence." Deft. brf at 19-20.

Claim (2) was alleged in the petition. (R. Vol. I, C189-C192) Contrary to defendant, it was addressed at length in the motion to withdraw. (R. Vol. III, C408-C410) It also was addressed at length in the evidentiary hearing on the first motion to vacate plea, at which counsel Sharp (R. Vol. IX, 20-34) and defendant (R. Vol. IX, 11-17) gave testimony defeating ***19** it, as counsel stated in her motion to withdraw (R. Vol. III, C407-C410). Sharp was not defendant's attorney at sentencing, when the trial court granted counsel Liles' motion to admit and read from defendant's medical records. (R. Vol. IX, 77-78)

Allegedly unaddressed claim (2) thus is clearly frivolous. Defendant does not assert otherwise. He contends the record fails to show the insufficiency only of alleged unaddressed claim (1). Deft. argument (c), at deft. brf at 22-28. He does not assert the sufficiency of allegedly unaddressed claim (2), or of any of the claims actually contained in the petition. Defendant does not challenge counsel's conclusion and the trial court's agreement (R. Vol. III, C408-C410, Vol. X, 9) that allegedly unaddressed claim (2), regarding counsel Sharp's alleged failure to investigate his mental health problems, as well as the other claims actually raised in the petition, are frivolous. He thereby concedes that those conclusions are correct, and that the petition's claims are frivolous.

Defendant also (b) asserts there was noncompliance with only the first of Rule 651(c)'s three requirements. He expressly concedes the second requirement, that counsel had examined the record of the proceedings at trial, "appear[ed] to be satisfied," where the record contained timesheets including entries for reviewing the record. Deft. brf at 21. ***20** As to the third Rule 651(c) requirement, defendant asserts:

By moving to withdraw, counsel necessarily asserted that there were no meritorious issues to be presented, so compliance with Rule 651(c)'s third requirement would appear to be unnecessary under these circumstances. Greer, 212 Ill.2d at 205 ("Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf").

Deft. brf at 21.

Contrary to defendant, under Greer, and as shown above, the case turns on "compliance with Rule 651(c)'s third requirement." Such compliance is not "unnecessary," but is undoubtedly required. S. Ct. Rule 651(c); Greer, 212 Ill.2d at 204-205, 817 N.E.2d at 519. Rule 651(c)'s third requirement is that the record show that appointed post-conviction counsel "has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions." S. Ct. Rule 651(c). As defendant acknowledges in citing the quote from Greer and as Greer holds in the sentence following it, "If amendments to a pro se postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." Greer, 212 Ill.2d at 205, 817 N.E.2d at 519. Counsel thus may withdraw if the record establishes compliance with Rule 651(c), which, as to the rule's third requirement, is established by a record showing that the ***21** petition's claims are patently without merit and frivolous, and so are not "necessary for an adequate presentation of petitioner's contentions." Greer, 212 Ill.2d at 204-205, 210-212, 817 N.E.2d at 519-520, 522-523; see S. Ct. Rule 651(c).

As shown above, defendant expressly concedes compliance with the rule's second requirement, asserts compliance with the third is "unnecessary" where "counsel *** asserted that there were no meritorious claims to be presented" and where Greer holds fulfillment of the third Rule 651(c) requirement "does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf," and asserts noncompliance with only the first Rule 651(c) requirement. Deft. brf at 21. Defendant thereby does not contest, and implicitly concedes, that counsel complied with the third Rule 651(c) requirement, where the claims he asserts she did not address in her motion to withdraw are frivolous and spurious.

Defendant also implicitly concedes that counsel complied with the first requirement, where the "petitioner's contentions" to which the third Rule 651(c) requirement refers are the same "contentions" to which the rule's first requirement refers: that the record show counsel "has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights." S. Ct. Rule 651(c).

***22** The record also contains defendant's explicit concession to that effect - his allegation in his motion to strike the motion for leave to withdraw that:

> [Defendant] has discussed his former counsel John Sharp's ineffectiveness with post-conviction counsel Sara Mayo on several occasions. [Defendant] has stated to Sara Mayo that John Sharp lied to him, falsified evidence, refused to investigate his mental history, and sent him a letter attempting to rush him and coerce him into accepting a plea of guilty.

(R. Vol. III, C418)

Defendant thus concedes that counsel complied with Rule 651(c), and that the claims in his petition are frivolous and spurious. Deft. brf at 21. He thus concedes that the motion to withdraw was properly granted. See Greer, 212 I11.2d at 204-205, 210-212, 817 N.E.2d at 519-520, 522-523.

Defendant's argument (c), however, is that the record does not show that all of his claims are frivolous and patently without merit, where (i) the trial court so found in advancing the petition to second-stage review, and alternatively, where (ii) the petition contained allegedly unaddressed claim (1) that defendant was denied effective assistance and due process where defense counsel Sharp "lied to him about the evidence against him," and that claim is supported by Pam and Julie Meyer's attached affidavits. Deft. brf at 22-24.

***23** Contrary to defendant's argument (c) (i), the trial court's first-stage finding that the petition's claims were not frivolous or patently without merit (R. Vol. III, C382) does not control whether it may later grant appointed counsel's motion to withdraw. The supreme court stated the fact that no such finding was made in Greer was irrelevant to its analysis of whether and when such a motion may be granted. Greer, 212 I11.2d at 202-203, 817 N.E.2d at 518 (stating it made its analysis "notwithstanding" the lack of such a finding, recognizing that Act §§122-2.1 and 122-4 provide for appointment of counsel when a "pro se

postconviction petition is not summarily dismissed by the circuit court within 90 days of filing, irrespective of whether the circuit court has actually considered the merits of the petition"). Appointed counsel in post-conviction proceedings has duties above and beyond the procedures set forth in the Act. Greer, 212 I11.2d at 205-206, 817 N.E.2d at 519-520 (discussing S. Ct. Rules 137, 651(c)); Greer, 341 Ill.App.3d at 909, 793 N.E.2d at 220 (same). Counsel's obligation to meet those duties is unaffected and undiminished by the provisions of the Act. Id. A trial court's first-stage finding pursuant to the Act that a petition is not frivolous or patently without merit does not alter that obligation. See id. Accepting defendant's argument would mean that counsel appointed after the court makes such ***24** a finding could never withdraw, but would be forced to advance even meritless claims. Such a result is "simply untenable," contrary to supreme court rules, and contrary to the reasoning of the supreme court's and this court's decisions in Greer and the principles on which they rely. See id.

Contrary to defendant's argument (c) (ii), and as he implicitly concedes in his argument (b) (deft. brf at 21 as to the third Rule 651(c) requirement (see above)), the record does show that all the petition's claims are frivolous and patently without merit. The only such claim he asserts is meritorious is what he maintains is the petition's allegation that he was denied effective assistance and due process where defense counsel Sharp "lied to him about the evidence against him" (referred to above as "allegedly unaddressed claim (1)"), which he asserts is supported by Pam and Julie Meyer's affidavits, attached to the petition. Deft. brf at 22.

Defendant asserts (i) taking all well-pled facts as true, "the affidavits and petition" establish "Sharp falsely told [defendant's] mother and aunt that blood had been found on [defendant's] shirt, and that that blood would most likely match [victim] Geldrich," (ii) "[t]he record clearly establishes that no blood was ever found on [defendant's] shirt," (iii) the petition and affidavits establish "[defendant's] mother conveyed this information to defendant ***25** at Sharp's behest in an effort to convince him to plead guilty," and (iv) the affidavits and petition allege "[defendant] never wanted to plead guilty and it was only after being subjected to a great deal of persuasion by his family, using this false information, that he finally agreed to do so." Deft. brf at 24-25.

Defendant asserts those "facts" "establish" arguable claims that: (1) "[defendant's] plea was not knowing and voluntary where it was based on Sharp's false representations regarding the evidence"; and (2) ineffective assistance, where (a) Sharp's performance was objectively unreasonable in telling defendant "the State ha[d] evidence against him that never existed," and (b) defendant was prejudiced, as shown by (i) statements in the petition and affidavits that defendant would not have pleaded guilty if Sharp had not misrepresented the evidence, and (ii) the existence of a defense that only aggravated battery, not attempted murder, took place. Defendant asserts such a defense was "arguably plausible" where Howell "was being held accountable for the exact same actions as [defendant]" but was acquitted of attempted murder and convicted of aggravated battery. Deft. brf at 25-27.

Contrary to defendant, Howell's and defendant's actions were far from "exact [ly]" the "same." As defendant testified at Howell's juvenile proceeding, defendant told Howell to be ***26** the lookout, Howell did not agree and ran, while defendant entered the house, though he testified he did so only to find the victim beaten on the floor, then checked, with his hand inside his shirt, to see if she was breathing. (Exs. env. 1, People's Ex. 1, 99-101, 132-138).

Contrary to defendant and as shown above, the petition does not make the allegations defendant asserts. The petition alleges defendant's rights to effective assistance and due process were violated "when his counsel John Sharp failed to investigate [defendant's] mental issues, told [defendant], his mother Julie Meyer and his aunt Pam Meyer lies in order to force a guilty plea upon [defendant]." (R. Vol. I, C189)

Neither the petition nor the affidavits identify, however, what those alleged "lies" were. The petition alleges Sharp asked his mother and aunt to convince him that it was in his best interest to plead guilty to attempted murder and home invasion "and that if he did he would receive between 12 and 20 years." (R. Vol. I, C191). It alleges defendant told appellate counsel he wanted to withdraw his plea on grounds Sharp was ineffective (a) for hiding police reports and medical records in order to coerce him into a guilty plea, telling him he would receive 12-20 years if he pleaded guilty, and manipulating his aunt and mother into believing they had to convince him to plead guilty because his aunt did not pay ***27** Sharp enough to take the case to trial, and

(b) because defendant had a defense worthy of consideration. It asserts defendant pleaded guilty without knowing the contents of medical records or police reports, which, he learned after Sharp was "fired" and new counsel was hired, showed medical personnel stated the victim was in "stable" condition, not a "life-threatening situation." (R. Vol. I, C192-C193)

The petition thus does not allege that Sharp lied or made false representations to Julie or Pam Meyer, or to defendant, about the evidence, about blood on his shirt, or about anything. Were the alleged "lies" counsel's alleged statement that if defendant pleaded guilty he would receive 12-20 years? Were they that medical records and police reports showed the severely injured 98-year-old victim was not in a "life-threatening situation"? The petition is insufficient even to allege those claims. It does not identify the "lies" it alleges counsel Sharp told defendant, his mother and aunt "in order to force a guilty plea upon" him.

The same is true of the affidavits.

Defendant supplied no affidavit of his own. He thus fails to provide even his own sworn statement supporting the petition's allegations, including that counsel Sharp lied to him, or what those "lies" might have been.

Defendant's mother Julie Meyer stated in her affidavit ***28** that Sharp told her if she did not convince defendant to plead guilty he would be in prison for the rest of his life, but if she convinced him to plead guilty he would receive 12-20 years. (R. Vol. II, C205). She also stated:

> I was very scared when John Sharp told me there was evidence that would get [defendant] put in prison for life. I found out later that more evidence existed and John Sharp told me lies but at that time I was scared for my son's life so I thought I had to get him to plead guilty. [Defendant] was not aware of the evidence. He only knew what my sister Pam Meyer and I told him. *** [Defendant] did not plead guilty because he is guilty, he plead guilty because his lawyer told me to give him information that I later found out was false, he was mentally ill, his attorney, his aunt and I all told him he had to plead guilty.

(R. Vol. I, C205-C206)

Like the petition, defendant's mother's affidavit asserts Sharp told her "lies" but fails to identify what they were. It states defendant's "lawyer told me to give him information that I later found out was false," but fails to identify the allegedly false information. It makes no reference to blood on defendant's shirt.

The only such reference in the petition and affidavits is in defendant's aunt Pam Myer's statement in her affidavit that "Mr. Sharp told us about some evidence they had against [defendant], including [defendant's] t-shirt with blood on it, saying it was probably the victim[']s. It ended up being someone else's blood and had nothing to do with the case." (R. ***29** Vol. II, C202) The statement that Sharp told "us" the evidence against defendant included his "t-shirt with blood on it" which "probably" was the victim's does not describe a lie or even a misrepresentation or misstatement of the evidence. The statement that "It ended up being someone else's blood and had nothing to do with the case" states only that the probability Sharp allegedly described was not borne out by later testing. It is contradicted by the only reference in the record to the existence of blood on defendant's clothing: Detective Sims' testimony at sentencing that to his knowledge, no blood was found on defendant's clothing. (R. Vol. IX, 58, 61)

The petition thus does not allege, nor do the affidavits state, that Sharp lied to Julie or Pam Meyer, or to defendant, about the evidence, much less about blood on his shirt, or about anything. The only statement regarding blood, in defendant's aunt's affidavit, is contradicted by the record. As shown above, counsel's motion to withdraw addressed the claims that were contained in the petition. As shown above and as defendant concedes, those claims are frivolous, as counsel argued in her motion to withdraw and the trial court necessarily agreed in granting it. As also shown above and as defendant concedes, counsel complied with Rule 651(c).

The record indicates "counsel fulfilled [her] duties as prescribed by Rule 651(c)" and "supports counsel's assessment ***30** that the defendant's postconviction claims were frivolous and without merit." See Greer, 212 I11.2d at 212, 817 N.E.2d at 523. The trial court was correct in granting the motion to withdraw. Id. This court should affirm that ruling.

*31 ARGUMENT

II THE TRIAL COURT WAS CORRECT IN GRANTING THE STATE'S MOTION TO DISMISS.

"The fact that counsel has been granted leave to withdraw does not mean that the postconviction petition is dismissed." People v. Greer, 341 I1.App.3d 906, 910, 793 N.E.2d 217, 221 (4th Dist. 2003). Here, unlike in Greer, the trial court dismissed defendant's petition on the State's motion. R. Vol. III, C387-C388, C453-C454, Vol. X, 9; cf. Greer, 341 Ill.App.3d at 910, 793 N.E.2d at 220-221.

"Throughout the second *** stage [] of a postconviction proceeding," defendant "bears the burden of making a substantial showing of a constitutional violation." People v. Pendleton, 223 I11.2d 458, 473, 861 N.E.2d 999, 1008 (2006). "All well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." Id. A second-stage dismissal is reviewed de novo. Id.

On his appeal from his petition's dismissal, defendant challenges only the grant of counsel's leave to withdraw. He does not argue his petition was erroneously dismissed. He thus concedes it was correctly dismissed.

As shown in Issue I, post-conviction counsel complied ***32** with Rule 651(c). Defendant argues otherwise only on the ground that counsel failed to address in her motion to withdraw two issues, one of which counsel did address, the other of which was not made in the petition. Deft. brf at 21-22; see Issue I. The trial court found the petition's claims fail to make a substantial showing of a constitutional violation. (R. Vol. III, C454) As defendant concedes, counsel concluded, and the trial court necessarily found in granting the motion to withdraw, the petition's claims are frivolous. See R. Vol. III, C453, see Issue I. As defendant also concedes in failing to argue otherwise, the court was correct in granting the State's motion to dismiss it. This court should affirm that ruling.

*33 CONCLUSION

WHEREFORE, the PEOPLE OF THE STATE OF ILLINOIS respectfully request that the judgment of the circuit court be affirmed, and that costs be assessed pursuant to 55 ILCS 5/4-2002.

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